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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MM Docket No. 95-162

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments, RM-8714  
FM Broadcast Stations.  
(Wellsville, New York)

**NOTICE OF PROPOSED RULE MAKING**

Adopted: September 18, 1995; Released: October 30, 1995

Comment Date: December 21, 1995  
Reply Comment Date: January 5, 1996

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Erin Communications, Inc. ("petitioner"), licensee of Station WJQZ(FM), requesting the substitution of Channel 278A for Channel 228A at Wellsville, New York, and the modification of Station WJQZ(FM)'s license to specify the alternate Class A channel. Petitioner states that the substitution of channels could enable the station to increase its power from its current 3 kW to 6 kW. It also states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 278A for Channel 228A at Wellsville since it could enable Station WJQZ(FM) to improve its facilities and thus provide service to an additional population. Channel 278A can be allotted to Wellsville in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.7 kilometers (5.4 miles) southwest to accommodate petitioner's desired transmitter site.<sup>1</sup> Canadian concurrence in the allotment is required since Wellsville is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

<sup>1</sup> The coordinates for Channel 278A at Wellsville are 42-03-24 North Latitude; 78-00-34 West Longitude.

3. As requested, we also propose to modify Station WJQZ(FM)'s license to specify operation on Channel 278A. We will not accept competing expressions of interest in the use of Channel 278A at Wellsville because the procedures outlined in Modification of FM and TV Licenses, 98 FCC 2d 916 (1984), and Section 1.420(g) of the Commission's Rules, do not apply in this case since no upgrade in class is contemplated.<sup>2</sup>

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	<u>Channel No.</u>	
<u>City</u>	<u>Present</u>	<u>Proposed</u>
Wellsville, New York	228A	278A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 21, 1995**, and reply comments on or before **January 5, 1996**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James A. Koerner, Esq.  
Baraff, Koerner, Olender & Hochberg, P.C.  
Three Bethesda Metro Center, Suite 640  
Bethesda, Maryland 20814-5330  
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of

<sup>2</sup> The Commission considers channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. See Vero Beach, Florida, 3 FCC Rcd 1049 (1988), rev. denied, 4 FCC Rcd 2184, 2185 (1989).

1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

#### FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

#### APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's

Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the

comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.